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84-1167

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ENIS M. I. PINAR,

Petitioner,

v.

ELIZABETH H. DOLE, Secretary of Transportation, LYNWOOD ELKINS, ALLEN FAHEY, WILLIAM HALLIGAN, EDWARD JONES, and WILLIAM MORSE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did Congress intend to prohibit a judicial remedy to federal employees alleging constitutional injuries or arbitrary and capricious agency action?

2. Does the Constitution imply a damages remedy for a federal employee whose First Amendment rights have been violated by actions not remediable under the Civil Service Reform Act?

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ENIS M. I. PINAR,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Enis M.I. Pinar, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 22, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 747 F.2d 899 (4th Cir. 1984), and appears in the Appendix at 1a-29a. The oral and written orders of the United States District Court for the Eastern District of Virginia granting Respondent's Motion to Dismiss Petitioner's

claims are not reported and appear in the Appendix at 30a-32a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 22, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves sections of the Civil Service Reform Act of 1978 ("CSRA"), as amended, 5 U.S.C. §§ 1206, 2302, 7512, and 7703 (1983), and regulations codified in 5 C.F.R. Part 771 (1983).

STATEMENT OF THE CASE

Petitioner, Enis M.I. Pinar, is employed by the federal government as a Police Officer at Washington (D.C.) National Airport, under the auspices of the United States Department of Transportation.[1]

On February 11, 1981, Pinar issued parking tickets to two automobiles, owned by Members of Congress, which were illegally occupying parking spaces reserved for employees of the National Airport control tower. The next day, Pinar ticketed the vehicles again, for the same offense and also for being illegally parked for more than 24 hours. On February 13, 1981, Respondent Morse, Pinar's shift supervisor, observed the tickets and, stating that he was engaged in lobbying activities with Congress for police benefits, ordered Pinar to void them. Pinar, who lacked the authority to void validly issued tickets, refused. Shortly thereafter, Respondents Fahey and Elkins, as well as Morse, told Pinar that he should not have ticketed automobiles owned by Congressmen. *See* Appendix ("App.") at 3a.

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[1] Respondent Dole is sued in her official capacity as the Secretary of Transportation. Respondents Elkins, Fahey, Halligan, Jones, and Morse, all supervisory Police officials at National Airport, are sued herein in their official capacities and also individually.

On May 28, 1981, Pinar wrote a letter to Elkins in which he alleged that Morse was "subordinating the duties of a federal law enforcement officer," as evidenced by Morse's order that Pinar void tickets issued to Congressmen "for no other reason than that they are Congressmen." Within two weeks, respondents demoted Pinar from a temporary promotion he had been awarded, and they subsequently placed a formal reprimand in his files and suspended him for two days without pay.

Pinar was not entitled to an administrative appeal of his demotion, suspension, or reprimand under the statutory appeals process.[2] Rather, Pinar's administrative remedies were limited to a complaint to the Special Counsel,[3] or an internal grievance.[4] Neither procedure permits the employee to introduce testimony or to cross-examine witnesses under oath, nor is there an appeal or judicial review of the administrative decision. Pinar both com-

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[2] In the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (codified throughout 5 U.S.C.), Congress provided for an administrative appeal only of "adverse actions", *i.e.*, removals, demotions, and suspensions for more than 14 days. 5 U.S.C. § 7512. Under the statute, decisions on those appeals are subject to review by the Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703 (1983).

[3] In the Civil Service Reform Act, Congress established the Special Counsel to inquire into complaints of "prohibited personnel practices". 5 U.S.C. §§ 1206, 2302(b). The nature of the Special Counsel's inquiry into a complaint is discretionary, and there is no appeal from or judicial review of his decision on the complaint. *See Borrell v. Int'l. Communications Agency*, 682 F.2d 981, 984-85 (D.C. Cir. 1982) (citing letter from Special Counsel).

[4] In 5 C.F.R. Part 771 (1984), the federal Office of Personnel Management has required agencies to establish procedures to consider grievances over employment conditions. As the system is intended to operate, a "grievance examiner" conducts an inquiry and issues a recommendation on the grievance. The agency, however, is free to reject the examiner's recommendation. Excluded from the list of grievable subjects is the removal of Pinar from his temporary promotion. 5 C.F.R. § 771.206(vii) (1984).

plained to the Special Counsel and filed grievances, but the decisions were adverse to him.[5]

Lacking access to any procedure with a trial-type hearing and judicial review, Pinar filed suit in United States District Court raising three claims against the respondents.[6] *First*, Pinar alleged that the actions taken against him were arbitrary, capricious and in violation of his First Amendment rights, and he asked the court to overturn them under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* *Second*, Pinar asked the court for relief, including injunctive relief, from the agency's unconstitutional conduct. *Finally*, Pinar raised a *Bivens*[7] claim for damages against respondents Elkins, Fahey, Halligan, Jones, and Morse in their individual capacities, alleging that they had tortiously violated his First Amendment right to communicate with his superiors about a matter of public concern: whether Congressmen may park illegally solely because they are Congressmen.[8]

Respondents moved to dismiss or, in the alternative, for summary judgment, on the ground that the Civil Service Reform Act (hereinafter "CSRA"), is the exclu-

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[5] Respondent agency, the decision-maker on the grievances, rejected Pinar's grievance of his reprimand on the ground it was received one day late. The examiner on Pinar's grievance of his suspension ruled in his favor, but the agency rejected that decision.

[6] Pinar invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1346(a)(2).

[7] In *Bivens v. Six Unknown Named Federal Narcotics Agents*, 403 U.S. 388 (1971), the Court inferred a damages remedy under the Constitution for otherwise unremediable violations of the Fourth Amendment. *Bivens* suits against federal officials also have been permitted for violations of the Fifth and Eighth Amendments. *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980).

[8] FAA regulations specify that Congressmen and other dignitaries may park without charge in any Airport lot or at any metered parking space. The regulations do not authorize illegal parking.

sive remedy for Pinar, even if it does not provide for an appeal or judicial review of his injuries. According to respondents, the CSRA implicitly precludes *all* civil actions by federal employees in district court, even for relief under the Constitution. On August 12, 1983, the district court granted the motion, App. at 30a, ruling from the bench that "Congress concluded that they are going to cut off disciplinary actions that are modest in nature at the administrative level and not give any judicial review", App. at 32a.

The Fourth Circuit affirmed the district court's dismissal of all of Pinar's claims. The court held that "Congress clearly intended the CSRA to be the exclusive remedy for federal employees and the Court of Appeals for the Federal Circuit to be the sole forum for judicial review". App. at 25a. Because the CSRA does not provide for judicial review of suspensions for less than 14 days or of the other actions taken against Pinar, the court reasoned that the statute's "detailed scheme" would be undermined if he could seek direct judicial review under the APA. App. at 23a-24a, quoting *Broadway v. Block*, 694 F.2d 979 (5th Cir. 1982).

For the same reasons, the court refused to consider Pinar's plea that he is entitled to a judicial forum for his constitutional claims. Though assuming that Pinar's First Amendment rights had been violated, App. at 6a, the Court held that "Congress clearly intended the comprehensive [administrative] remedies available to Pinar to be exclusive," even if they did not provide for judicial review of his First Amendment claims. App. at 18a. The Court dismissed Pinar's assertion that the courts are the only competent arbiter of a claim of unconstitutional governmental conduct, reasoning that "even the most minor disciplinary actions can be alleged to have been taken in retaliation for something once said that is protected by the first amendment . . . ." App. at 20a.

Finally, the court refused to permit Pinar a *Bivens* remedy against his superiors for violating his constitutional rights. Although it had just ruled out any possibility for equitable judicial relief for Pinar's constitutional injuries, the Fourth Circuit held that a damages remedy was not necessary to redress the "minor" disciplinary actions taken against him. App. at 8a, 15a.

REASONS FOR GRANTING THE WRIT

I. There is a Serious Conflict Among the Circuits Concerning the Preclusive Effect of the CSRA on the Civil Remedies Available to Federal Employees

Review of the lower court's decision is necessary to resolve a serious and growing conflict among the courts of appeals concerning the ability of federal employees to seek judicial relief from injuries for which no remedy is provided in the CSRA. This division is evident not only from Circuit to Circuit, but also within Circuits as the courts are unable to agree whether Congress intended to limit the judicial forum to those actions specified in the CSRA. *See* note 2, *supra.*

The District of Columbia Circuit permits suits by federal employees for relief from constitutional violations because the court "can find no clear signal" from the language and legislative history of the CSRA

> that Congress meant to deprive [employees] of the only cause of action [they have] to protect [their] constitutional rights and which [they] had even before the CSRA was passed.

Borrell v. Int'l. Communications Agency, 682 F.2d 981, 991 (D.C. Cir. 1982). The court bases its analysis on the failure of Congress to provide an adequate administrative process or judicial review under the CSRA for certain kinds of claims. *Id.* at 990 (a statutory remedy providing no administrative appeal or "judicial forum at all . . . is not an adequate enough substitute for a prior

judicial cause of action so that we can infer from the statute a Congressional desire to eliminate the pre-existing right"). *Accord Williams v. Internal Revenue Service*, 745 F.2d 702, 705 (D.C. Cir. 1984); *Cutts v. Fowler*, 692 F.2d 138, 140 (D.C. Cir. 1982). *See also Kennedy v. United States*, No. 505-82C, slip op. at 3 (Cl.Ct. July 31, 1984) ("where an employee claims he was unconstitutionally deprived of a statutorily created substantive right, and where no other review is available, this Court is not prepared to abandon its jurisdiction over such a claim"). The First Circuit has reached the identical conclusion, granting judicial review under the APA of actions not otherwise reviewable under the terms of the CSRA. *Dugan v. Ramsay*, 727 F.2d 192, 195 (1st Cir. 1984) (relying upon "the strong presumption in the law that favors reviewability and almost never implies statutory preclusion of review from congressional silence").

The Fourth Circuit, on the other hand, now joins the Fifth, Ninth, and Eleventh Circuits in dismissing all claims by federal employees on the ground that their exclusive remedy rests solely with the CSRA. *Broadway v. Block*, 694 F.2d 979, 986 (5th Cir. 1982) (declining "to allow an employee to circumvent this detailed scheme governing federal employer-employee relations by suing under the more general APA"); *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir. 1984) (the CSRA "indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all"); *Hallock v. Moses*, 731 F.2d 754 (11th Cir. 1984). In addition, while one panel of the D.C. Circuit has refused to infer from Congress' silence its intent to limit judicial review of constitutional claims, *Borrell, supra*, another panel of the same Circuit has reached the opposite holding under the APA. *Carducci v. Regan*, 714 F.2d 171, 174 (D.C. Cir. 1983) (failure to provide in CSRA for judicial review of certain agency actions "reflects a congressional intent that no judicial relief be available").

On an equally important and related issue, whether the remedies available to Pinar are sufficiently effective to preclude a *Bivens* remedy, the courts are similarly divided. In *Bush v. Lucas*, 103 S.Ct. 2404 (1983), this Court declined to create a *Bivens* remedy for a federal employee for whose demotion Congress had provided an administrative hearing with judicial review. It left unanswered, however, whether the Constitution required that a damages remedy be made available to employees who were affected by actions not appealable under the statute. *Id.* at 2411 n.14. The D.C. Circuit holds that such employees may maintain a *Bivens* action. *Bartel v. Federal Aviation Administration, et al.*, 725 F.2d 1403, 1415 (D.C. Cir. 1984), citing *Bush*, 103 S.Ct. at 1418 (Marshall, J., concurring) ("nothing in [*Bush*] foreclose[s] a federal employee from pursuing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme").[9]

The D.C. Circuit's *Bivens* holding is in direct conflict with the Fifth and Eleventh Circuits, which (together with the Fourth Circuit's decision in the instant case) have extended *Bush* to preclude a *Bivens* action even for employees who have no other means of judicial review of their claims of unconstitutional agency conduct. *See Broadway v. Block*, 694 F.2d 979, 985 (5th Cir. 1982); *Hallock v. Moses*, 731 F.2d 754, 757 (11th Cir. 1984).

Resolution of these issues is of vital interest to federal employees, whose access to a judicial forum on their con-

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[9] Four of the eight judges of the Seventh Circuit, sitting *en banc*, agree that "the constitutional rights of federal employees in the workplace which are not protected by statute properly form the basis of a *Bivens* action." *Egger v. Phillips*, 710 F.2d 292, 298 (7th Cir.) (*en banc*), *cert. denied*, 104 S.Ct. 284 (1983). While the plaintiff's claims ultimately were rejected on immunity grounds, 710 F.2d at 314, in a concurring opinion the remaining four judges expressly declined to adopt the *Bivens* portion of the opinion. *Id.* at 324.

stitutional claims is currently determined by the fortuity of the Circuit in which they work. To the best of counsel's knowledge, none of the questions in this case previously has been presented to this Court for review.

II. The Fourth Circuit's Holding that the CSRA Implicitly Bars any Judicial Review of Petitioner's Constitutional Injuries is in Conflict with the Decisions of this Court.

The Fourth Circuit's holding that Congress implicitly rejected judicial review of Pinar's claims is incompatible with the presumption, repeatedly noted by this Court, in favor of judicial review of agency action. *See, e.g., Barlow v. Collins*, 397 U.S. 159, 166 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). Though that presumption of course may be overcome, *Block v. Community Nutrition Institute*, 104 S.Ct. 2450, 2456 (1984), this Court requires "clear and convincing evidence" that Congress intended to "restrict access to judicial review". *Abbott Laboratories*, 387 U.S. at 141. The kind of evidence the Court requires may be found in "specific language or specific legislative history that is a reliable indicator of congressional intent", *Community Nutrition Institute*, 104 S.Ct. at 2456; the CSRA, however, contains no such language or legislative history. *See Dugan v. Ramsay*, 727 F.2d at 195 (APA); *Borrell v. Int'l. Comm. Agency*, 682 F.2d at 989 (Constitution).

Nor is Congress' intent to deny judicial review implicit from the CSRA's statutory scheme. Relying on *Community Nutrition Institute*, the lower court found that Congress' failure to specify judicial review of the "minor" actions to which Pinar was subjected supported the inference that Congress intended to deny such review. App. at 19a, 23a. That analysis is inapposite, however, for the question in *Community Nutrition Institute* was not *whether*, but *to whom* judicial review was available. 104 S.Ct. at 2455.[10] *Community Nutrition Institute* supports

[10] Interpreting the Agricultural Marketing Agreement Act of 1937, § 608(c), 7 U.S.C. § 608(c)(15)(B), the Court held that the

a judicial forum in this case, for aside from Pinar's civil action no other judicial review of his constitutional claims is possible. *See Barlow v. Collins*, 397 U.S. 159, 175 n.9 (1979) (Brennan, J., concurring in part) (where injured plaintiff is the only party likely to challenge agency action, refusal of review commits the action "wholly to agency discretion, thus risking frustration of the statutory objectives"). Thus, the Fourth Circuit's analysis does not satisfactorily resolve whether Congress' silence in a statute can result in an absolute preclusion of judicial review of claims of constitutional injuries.

This Court has never turned aside a constitutional challenge on the ground it has not been expressly authorized by Congress. *See, e.g., I.N.S. v. Chadha*, 103 S.Ct. 2764, 2779 & n.13 (1983). On the contrary, this Court has consistently permitted suits under the APA and the Constitution where Congress has failed to provide another adequate mechanism of review. *See Davis v. Passman*, 442 U.S. at 246-47 (1979) (Congress' failure to include Congressional employees within Title VII requires that they be afforded "whatever remedies [they] might otherwise possess" under the Constitution); *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (suit permitted under Eighth Amendment where Federal Tort Claims Act provided inadequate remedy); *Johnson v. Robinson*, 415 U.S. 361, 373-74 (1974) (statute barring review of decisions of the Veterans Administrator does not preclude judicial review of allegations that statute is unconstitutional); *Barlow v. Collins*, 397 U.S. at 166-67 (permitting suit under APA though Food and Agriculture Act of 1965 contained no provision for judicial review).

Where, as here, an injured plaintiff seeks to invoke well-established causes of action under the APA and the Constitution, and where he is the only party capable of

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provision for judicial review of milk market orders only at the behest of dairy handlers evidenced Congress' intent to preclude court challenges by consumers. *Block*, 104 S.Ct. at 2458.

raising such a challenge, the Fourth Circuit's denial of a forum impermissibly has placed the agency's unconstitutional conduct entirely beyond judicial review.

III. The Historic Obligation of the Courts to Resolve Constitutional Claims Requires Review of the Decision Below.

The Fourth Circuit's decision in this case leaves Pinar with no judicial remedy for the violations of his constitutional rights, and thereby contravenes fundamental constitutional jurisprudence. Since *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), there can be no doubt that when an act of the legislative or executive branches is alleged to violate the Constitution, "the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." The decision below, and the decisions on which it is based, represent a virtually unprecedented denial of judicial review of unconstitutional conduct.

Further, the lower court's finding that the administrative remedies to which Pinar was relegated constituted a competent forum for his constitutional claims is untenable in light of this Court's decision last Term in *McDonald v. City of West Branch, Mich.*, 104 S.Ct. 1799 (1984) (rejecting assertion that arbitration proceeding could bar a constitutional claim in federal court), citing *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (arbitration proceeding would not bar suit alleging violations of the Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (arbitration proceeding would not bar suit under Title VII).

McDonald requires that Pinar be permitted to raise his constitutional claims in federal court, regardless of the minimal administrative proceedings available to him. These remedies consisted exclusively of a complaint to the Special Counsel and an internal agency grievance. Because neither proceeding is adversarial, *i.e.*, they provide

for no testimony under oath or cross-examination and no transcript has been made, they cannot preclude a civil suit on the underlying constitutional claims. *See McDonald*, 104 S.Ct. at 1804; *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966) (administrative proceeding precludes civil action only on those issues "which the parties have had an adequate opportunity to litigate"). Preclusion is further unwarranted because the constitutional claims were not decided by individuals with legal training and, in the case of the internal grievances, the decisions were rendered by the same agency alleged to have committed the violations in the first place. Whether government officials have violated an employee's constitutional rights, and the relief to which he is entitled thereby, must be determined in a legal forum at least capable of judicial factfinding. *See McDonald*, 104 S.Ct. at 1803-1804.

IV. The Fourth Circuit's Denial of a Tort Remedy to Petitioner Erroneously Resolves the Question Left Open by this Court's Decision in *Bush v. Lucas*.

In addition to denying a judicial remedy to Pinar on his APA and constitutional claims, the lower court also denied him a cause of action against the individual respondents for violating his First Amendment rights. App. at 15a. The court based that holding on an erroneous reading of *Bush v. Lucas*, 103 S.Ct. 2404 (1983).

In *Bush*, the Court held that a federal employee who had been demoted in violation of the First Amendment could not maintain a *Bivens*-type damages claim against the official who took the action. The Court noted the extensive appeal rights available to a demoted employee, including an evidentiary hearing and subsequent judicial review,[11] and declined to "augment[]" that remedial sys-

[11] While Bush's appeal was taken before the passage of the CSRA, the Court correctly noted that the appeal procedures available to him are substantially similar to the procedures that are currently in effect, and that were unavailable to Pinar. *Bush*, 103 S.Ct. at 2415.

tem "by the creation of a new judicial remedy". 103 S.Ct. at 2416.

Bivens and its progeny establish the availability of a remedy in damages under the Constitution when there is no adequate and effective alternative. *See Carlson*, 446 U.S. at 20-23; *Davis*, 442 U.S. at 242; *Bivens*, 403 U.S. at 397. Examination of the analysis in these cases reveals that the Court requires both that the alternative recovery be equivalent *and* that the alternative forum be constitutionally adequate to consider the claim. Undoubtedly, to preclude a *Bivens* action the alternative forum must include at least an adversarial forum or judicial review. While the administrative appeals process for major disciplinary actions is "clearly constitutionally adequate", *Bush*, 103 S.Ct. at 2411 n.14, the Court observed that this process does not cover all actions, *id.* at 2415 n.28, and it expressly declined to decide whether the Constitution required a *Bivens* remedy for employees injured by actions not subject to appeal, *id.* at 2411 n.14. *See also id.* at 2418 (Marshall, J., concurring) (*Bush* does not "foreclose a federal employee from pursuing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme").

The lower court's decision contravenes the Court's reasoning in *Bush*. Having already held that Pinar had no access either to an adversarial forum or judicial relief for his claims against the agency, the court clearly was obligated to hear Pinar's constitutional claims against the individuals. Instead, based on its conclusion that Pinar was subjected only to "minor" violations of his First Amendment rights, the Fourth Circuit found the meager administrative remedies available to him sufficient to deny the tort.

A constitutional injury provides the basis for a claim in federal court, against either the government or the individual tortfeasor, and there simply is no justification for dismissing the claim on the ground the violation is

"minor". *See Borrell*, 682 F.2d at 990 n.7. While the relief may be adjusted to remedy adequately the injury, the foreclosure of *any* relief to Pinar for his constitutional claims is without principled support. *See Egger v. Phillips*, 710 F.2d at 298.

The lower court expressed its concern that employees subjected to "minor" discipline would flood the courts with allegations of constitutional violations. App. at 20a. There are sufficient pre-trial procedures available to the court, including the immunity defense and summary judgment, *see Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to ensure that insubstantial claims are promptly dismissed. However, the Fourth Circuit's decision leaves no room for consideration even of genuinely egregious violations of the Constitution.[12] Whether there is now a class of Americans who, though Congress is silent on the question, no longer have a judicial forum for claims of constitutional violations is an issue that merits review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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January 18, 1985

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[12] Under the lower court's ruling, the government may now suspend an employee repeatedly for periods of 14 days (less than the 15-day minimum necessary to invoke the statutory appeals process), in retaliation for protected speech, secure in the knowledge that the suspensions are immune from judicial review.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-2006

ENIS M. I. PINAR,

Appellant,

vs.

ELIZABETH DOLE, in her official capacity as Sec. of Transportation; WILLIAM HALLIGAN, individually and in his official capacity as Chief, FAA Public Safety Division; EDWARD JONES, individually and in his official capacity as Chief, National Airport Police; LYNWOOD ELKINS, individually and in his official capacity as Col. National Airport Police; ALLEN FAHEY, individually and in his official capacity as Lt. National Airport Police and WILLIAM MORSE, individually and in his official capacity, Sgt. National Airport Police,

Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
Richard L. Williams, District Judge. (C/A 83-0386)

Argued: March 7, 1984 Decided: October 22, 1984

Before WINTER, Chief Judge and RUSSELL and CHAPMAN, Circuit Judges.

George M. Chuzi (June D.W. Kalijarvi, Joan L. Bozek, Kalijarvi, Delate & Chuzi on brief) for Appellant; John

R. Tyler, Civil Division, Dept. of Justice (Richard K. Willard, Acting Assistant Attorney General, Elsie L. Munsell, United States Attorney, William G. Kanter, Civil Division, Dept. of Justice on brief) for Appellees.

CHAPMAN, Circuit Judge:

Enis Pinar, a Federal Aviation Administration (FAA) police officer in the Public Safety Division at the Washington National Airport (WNA), appeals the district court's order granting the defendants' "motion to dismiss, or in the alternative, for summary judgment."[1] Pinar brought this suit against Elizabeth Dole, Secretary of the Department of Transportation (DOT),[2] in her official capacity, and various employees of the FAA who are sued in both their official and individual capacities, contesting three personnel actions taken against him: (1) the issuance of a letter of reprimand for making false and unfounded statements about another employee; (2) a two-day suspension without pay and benefits for mishandling his firearm; and (3) the termination of his temporary promotion to GS-6 for being unresponsive to authority. Pinar brought claims against the defendants in their official capacities under the Administrative Procedures Act, 5 U.S.C. § 701 et seq., seeking declaratory and injunctive relief from the disciplinary actions taken against him. In addition, Pinar sought injunctive relief against the agency and money damages against the individual appellees on the grounds that the disciplinary actions taken against him were in violation of his first amendment rights. Finally, Pinar claimed his temporary promotion was terminated in violation of his fifth amend-

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[1] At the hearing on the defendants' motion, matters outside the pleadings were presented by the parties which were not excluded by the district court. Accordingly, we treat the court's ruling as one on a motion for summary judgment, Fed.R.Civ.P. 12(b), 56(c), and accept Pinar's version of the facts for purposes of this appeal. *Bishop v. Wood*, 426 U.S. 341, 347 (1975).

[2] The FAA is a federal agency within DOT.

ment right to due process. Finding that Pinar has no claim under the first amendment for monetary or injunctive relief against the appellees, has no right of judicial review under the APA, and has no cognizable property interest in his temporary promotion, we affirm the district court.

I

Pinar has been a police officer with the FAA police force at WNA since December of 1978 and is currently a GS-5. Pinar's performance evaluation from his superiors covering the time period at issue in this case appraised his performance as "outstanding." On February 11, 1981, Pinar issued parking tickets to two illegally parked cars licensed to members of Congress. On February 12, 1981, Pinar ticketed the same cars for being illegally parked in excess of 24 hours. On February 13, 1981, defendant Morse, Pinar's immediate supervisor, ordered Pinar to void the tickets. Pinar declined to comply with this order. According to the allegations of Pinar's complaint, Morse told Pinar he was lobbying with a Congressman for passage of legislation favorable to the airport police, and ticketing Congressmen would jeopardize Morse's lobbying efforts. Pinar also alleges his second and third-level supervisors, defendants Fahey and Elkins, advised him not to ticket Congressmen.

More than three months later, on May 27, 1981, defendant Morse disciplined Pinar for being late to roll call.[3] The next day Pinar wrote a formal complaint to Elkins charging Morse with harassment and accusing Morse of conduct unbecoming an officer relating to Morse's February 13 order to Pinar to void the parking tickets. Pinar requested Morse be reprimanded for "subordinating the duties of a federal law enforcement officer to the prospects of material gain through political lobby-

[3] Pinar won his grievance of the incident and it is not an issue in this case.

ing." Morse denied all of Pinar's allegations, and subsequently filed grievances against Pinar alleging Pinar had made "false and unfounded statements against him."

On June 10, 1981 Elkins informed Pinar that his temporary promotion to Special Functions Officer, GS-6, was being terminated as of June 14, 1981 because Pinar was unresponsive to authority. Pinar had been promoted on February 17, 1981, for a period not to exceed one year. The letter notifying Pinar of the temporary promotion, which was signed by him, provided it could be terminated at any time at the sole discretion of the FAA, and it might become permanent if Pinar met the requirements in the job description before the expiration of one year.

On September 9, 1981, defendant Jones notified Pinar of a proposal to suspend him for seven days for, *inter alia*, making false and unfounded statements about Morse in the May 28, 1981, letter of complaint. After consideration of Pinar and his attorneys' oral and written response to the proposal, Jones reduced the proposed suspension to a letter of reprimand which was issued on December 15, 1981. On or about December 28, 1981, Pinar submitted a formal grievance with respect to the December 15, 1981, reprimand. On January 20, 1982, defendant Halligan rejected the grievance as untimely since it was received after the ten-day period provided for such grievances by the applicable regulation. Pinar requested an extension of time to file his grievance from Airport Director Wilding, who denied it. Pinar appealed his letter of reprimand to the FAA Labor Relations staff. The Labor Relations staff appointed a grievance examiner, who concluded Pinar's grievance was not timely filed and was thus properly cancelled.

On February 2, 1982, defendant Jones proposed to suspend Pinar for 14 days for failing to properly secure his firearm on July 30, 1981, and for failing to observe

precautions for his safety and that of others.[4] With the assistance of counsel Pinar opposed the suspension in writing and orally, arguing the proposed suspension was not timely, would not serve as constructive discipline, and was contrary to the facts. Defendant Jones decided to suspend Pinar for five days. Pinar formally grieved the suspension and a grievance examiner was appointed by Halligan to investigate. The examiner recommended no disciplinary action be taken against Pinar. Jones submitted to Halligan his objections to the examiner's recommendations. Halligan disagreed with the examiner's recommendations and in accordance with FAA guidelines referred the grievance to the next higher level for decision. On January 17, 1983, Hugh Riddle, Jr., Deputy Director of MWA, rejected the examiner's recommendations, but reduced the suspension to two days.

On July 1, 1983 Pinar brought this suit in district court alleging the personnel actions taken against him were arbitrary and capricious and violative of his first amendment rights. Pinar also claimed his temporary promotion was terminated in violation of his fifth amendment right to due process of law. The district court dismissed Pinar's complaint. With respect to Pinar's APA and first amendment claims the court held that, in light of the comprehensive remedies available under the Civil Service Retirement Act of 1978, Pub. L. 95-454, 92 Stat. 1111 *et. seq.* (CSRA), relief in federal district court from the minor personnel actions at issue must be denied.

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[4] On July 30, 1981 Pinar, who was using the telephone in the Sergeant's office area, was told by Sergeants Tying and Hittle to leave the office area. After leaving, Pinar remembered that he had his weapon. Since FAA procedures specify that an officer must secure his weapon in a gun locker before leaving the station if he is not on duty, Pinar returned to the station, disengaged the cylinder of his weapon and placed it in front of Tyng, requesting that Tyng secure it for him. Tyng refused and an argument ensued. Sergeant Hittle then escorted Pinar to the gun locker to secure his gun.

The court also determined that Pinar had no legally cognizable property interest in his temporary promotion requiring due process protection under the fifth amendment.

II

The initial issue to be addressed is whether in light of the CSRA, Pinar has a claim under the first amendment for damages against the individual defendants. For purposes of this decision we must assume that Pinar's first amendment rights were violated by the disciplinary actions taken against him. See *Bush v. Lucas*, 103 S. Ct. 2404, 2408 (1983). Pinar asserts that his superiors are liable for their constitutional torts under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held that the Constitution itself supports a private cause of action for damages against a federal official. However, in *Bush v. Lucas*, 103 S.Ct. 2404 (1983), the Supreme Court declined to permit a federal employee to bring a *Bivens*-type cause of action for money damages against his supervisors for alleged violations of his first amendment rights. In *Bush*, an aerospace engineer employed at a facility operated by the National Aeronautics and Space Administration made a number of public statements that were highly critical of the agency. Subsequently the agency initiated an adverse personnel action to remove the engineer, Bush, from his position. After considering Bush's reply, respondent Lucas, the Director of the Center, demoted Bush instead of removing him. Bush successfully pursued administrative remedies and was ultimately restored to his former position and awarded back pay.

While his administrative appeals were pending, Bush brought suit against Lucas to recover damages for defamation and violation of his constitutional rights. The Supreme Court declined to authorize a new nonstatutory damages remedy for federal employees whose first amendment rights are violated by their superiors. The Court

concluded that "because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States. . . it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Bush*, 103 S.Ct. at 2406. In reaching its conclusion the Court acknowledged that a *Bivens* action could be defeated in two situations, one of which is where there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Bush*, 103 S.Ct. at 2411. The Court noted the comprehensive remedies available to federal employees who are aggrieved by personnel actions and stated:

> The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.

Id., 103 S.Ct. at 2416. The Court determined that this question would best be decided by Congress, which is in a far better position than a court to weigh the costs and benefits that would result from the addition of another remedy for federal employees whose constitutional rights have been violated. Thus, the Court declined to authorize a new nonstatutory damages remedy.

Pinar attempts to distinguish *Bush* on the ground that he was not afforded the comprehensive administrative remedies Bush received. Pinar argues that whereas Bush had substantial, constitutionally adequate remedies available to redress alleged constitutional violations, the statutory remedies available to him were inadequate and constitutionally deficient.

It is undisputed that Pinar was not afforded the extensive administrative remedies afforded to Bush.[5] It is equally clear that the personnel actions taken against Pinar—a letter of reprimand, two-day suspension, and termination of his temporary promotion—were less serious than the demotion or "adverse action" Bush received. The CSRA is designed so that employees who are subjected to more severe or "adverse" actions, 5 U.S.C. § 7513, are entitled to formal proceedings before the agency, an appeal to the Merit Systems Protection Board (MSPB), and judicial review in the Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(b)(1) (Supp. 1983). Employees who are subjected to such minor personnel actions as Pinar received are afforded internal agency grievances and a complaint to the Special Counsel. This remedial scheme reflects Congress' balancing of the interest of federal employees in procedural protections and the right of agencies to be able to maintain the most efficient workforce possible. S.Rep. No. 95-969, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code, Cong. & Admin. News at 2768.

The fact that the administrative remedies available to Pinar were less exhaustive than those available to Bush does not render *Bush v. Lucas* inapposite. Contrary to Pinar's assertions, the remedies available to him to redress each of the personnel actions taken against him were both comprehensive and constitutionally adequate. With respect to Pinar's two-day suspension for mishandling his firearm, the agency could only take action "for such cause as will promote the efficiency of the service" and only after affording Pinar:

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[5] The procedures available to Bush, which are substantially similar to those currently available to federal employees subjected to "adverse actions," 5 U.S.C. § 7513, included 30 days written notice of the proposed demotion, the right to answer the charges, the right to an agency decision by a higher level official, the trial-type hearing before the Civil Service Commission, and judicial review in either federal district court or the Court of Claims.

> (1) an advance written notice stating the specific reasons for the proposed action;
>
> (2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
>
> (3) [representation] by an attorney or other representative; and
>
> (4) a written decision and the specific reasons therefor at the earliest practicable date.

5 U.S.C. § 7503. In addition, copies of all records relating to the suspension must be "maintained by the agency and furnished to the MSPB upon its request and to the employee affected upon the employee's request." 5 U.S.C. § 7503.[6] Furthermore, an employee may grieve "any matter of concern or dissatisfaction relating to [his] employment . . . including any matter on which an employee alleges that coercion, reprisal, or retaliation has been practiced against him or her." 5 C.F.R. § 771.205. Thus, Pinar was able to file a formal grievance with respect to both the two-day suspension and the letter of reprimand under the agency's grievance system.[7]

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[6] These procedures apply to all employees suspended for a period of 14 days or less.

[7] The termination of a temporary promotion within a maximum period of two years, which returns the employee to the position from which temporarily promoted, is specifically excluded from the grievance procedures. (5 C.F.R. § 771.206(c)(vi)). With respect to grievable matters, FAA grievance procedures provided Pinar the right to: file a formal grievance with any written supportive evidence or other information the employee desires; official time to make a personal presentation to the grievance examiner; be represented by the representative of his choice; seek advice from agency personnel; and have a qualified grievance examiner appointed who is not directly or indirectly under the jurisdiction of the official whose action resulted in the grievance. Also, in investigating the grievant's complaint, the examiner may secure documentary evidence or personnel interviews. The employee may make a per-

The CSRA afforded Pinar other protections against unlawful actions by his supervisors. 5 U.S.C. § 2302(b)(8) declares it a "prohibited personnel action" to take any personnel action "as a reprisal for a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation . . . ." As the legislative history to this provision makes clear, Congress intended that a supervisor's taking "action against an employee . . . without having proper regard for the individual's privacy or constitutional rights . . . could result in dismissal, fine, reprimand, or other discipline for the supervisor." S.Rep. No. 95-969, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code, Cong. & Admin. News at 2745. Allegations of prohibited personnel practices are investigated by the Special Counsel for the MSPB, who has the authority to recommend corrective action to the agency involved and the MSPB. 5 U.S.C. § 1206(a)-(c). If the agency fails to implement the recommended corrective action, the Special Counsel may request the Board to consider the matter, and the Board may order such corrective action as it deems necessary. 5 U.S.C. § 1206(c)(1)(B). Section 1208 allows the Special Counsel to request, and the Board to grant, stays of personnel actions the Special Counsel reasonably believes were taken, or are to be taken, as a result of prohibited personnel practices. Judicial scrutiny of prohibited personnel practices is deemed to be "limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate

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sonal presentation. After the employee is given the opportunity to review the grievance file, the examiner submits a report of findings and recommendations to the grievance official. Within 10 days the grievance official must either: (1) accept the recommendation and issue a decision accordingly; (2) grant the relief sought without regard to the recommendations; or (3) find the examiner's recommendations unacceptable and refer the file to the next higher administrative level for decision. FAA Order 3770.2B, Chapter 4 (June 6, 1980).

inquiry." *Carducci v. Regan*, 714 F.2d 171, 175 (D.C. Cir. 1973) (quoting *Cutts v. Fowler*, 692 F.2d 138, 140 (D.C.Cir. 1982). Thus, Pinar was able to bring before the Special Counsel his claims that the personnel actions taken against him, including the termination of his temporary promotion, were taken in retaliation for exercising his first amendment rights. That the Special Counsel found no basis to determine that the agency acted illegally in disciplining Pinar does not render this remedy inadequate.

Pinar does not assert that he was not given the aforementioned protections, but rather that the statutory remedies afforded to him with respect to his two-day suspension and the termination of his temporary promotion were constitutionally inadequate to address the alleged violations of his constitutional rights [8] and that therefore due

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[8] Pinar also argues the grievance procedure through which he challenged his two-day suspension was constitutionally deficient because without violating an agency regulation defendant Jones wrote a memorandum to Halligan, the grievance official, recommending that the grievance examiner's recommendations be rejected. While the opportunity to refute all of the evidence on the basis of which disciplinary action is taken is a right protected by the due process clause, see *Doe v. Hampton*, 566 F.2d 265, 276-77 (D.C. Cir. 1977), the memorandum in question only expressed disagreement with the grievance examiner's conclusion, and did not allege factual matters. Pinar was thus not precluded from rebutting any of the facts upon which the grievance official relied. In addition, Halligan referred the grievance to the next higher level for decision, in accordance with FAA grievance procedures. This case is thus clearly distinguishable from *Sullivan v. Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983), wherein the appellant's supervisor, who had motives of reprisal against the appellant for previously accusing him of violating agency regulations sought to pressure the ultimate deciding official into making a decision to remove the appellant from his job. No such retaliatory motive on the part of Jones is present in this case, and since Halligan forwarded the report of the investigation to the next highest level for decision, he was not the "ultimate deciding official."

process requires that he be provided a judicially-created damages remedy in district court. We disagree.

We decline to accept Pinar's argument that because he was not afforded the exact same statutory remedial procedures available to Bush, the statutory procedures afforded him were inadequate as a matter of due process to redress the alleged violations of his first amendment rights. In enacting the CSRA Congress intentionally designed the remedial provisions of the Act to provide employees with differing amounts of process depending upon the seriousness of the personnel action taken. The United States Supreme Court acted similarly in the academic setting when it held that a student suspended from school for less than ten days, while having liberty and property interests that qualify for the protections of the due process clause, is entitled only to notice of the charges against him and an opportunity to present his version of the evidence, preferably prior to the suspension. *Goss v. Lopez*, 419 U.S. 565, 581 (1975). Due to the brevity of the suspension in question, the court refused to hold that due process requires affording the student "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." *Goss*, 419 U.S. at 583. The Court noted, however, that "longer suspensions or expulsions . . . may require more formal procedures." Id. at 584. Thus, "the length and consequent severity of a deprivation," while " 'not decisive of the basic right' to a hearing of some kind, is a "factor to weigh in determining the appropriate form of a hearing." Id. at 576 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972)). The Supreme Court has on other occasions held that due process may be satisfied by something less than a trial-type hearing. See *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Ingraham v. Wright*, 430 U.S. 651 (1977).

In the area of governmental employer-employee relations the Supreme Court has determined that "the exist-

ing civil service remedies [available to Bush] for a *demotion* in retaliation for protected speech are clearly constitutionally adequate." *Bush*, 103 S. Ct. at ——, n. 14; See *Arnett v. Kennedy*, 416 U.S. 134, 165-67, 185, 212-16 (1974) (per Powell, Blackmun, White, Douglas, Brennen, and Marshall, J.J.). However, the deprivation Pinar suffered was minor compared to the demotion Bush received, and certainly the importance of the interests involved is one factor to be considered in determining the formality and procedural requisites for a due process hearing. *See Board of Regents v. Roth*, 408 U.S. 564, 570, n.8 (1972) and *Arnett v. Kennedy*, 416 U.S. 134, 164, n.1 (1974) (Powell, J.) citing *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

Pinar's assertion, then, that the statutory remedies available to him to redress his due process claims are constitutionally inadequate merely because they are less comprehensive than the remedies afforded to petitioner Bush is faulty. As the Supreme Court stated in *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), "[i]t has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." Indeed, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

To determine what procedural protections are due in Pinar's particular situation, we must look to "the nature of the private interest, the adequacy of the existing procedure in protecting that interest, and the government interest in the efficient administration of the applicable law." *Thomason v. Schweiker*, 692 F.2d 333, 336 (4th Cir. 1982) citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). With respect to the "nature of [Pinar's] private interest," it is clear that Pinar's right to speak freely regarding matters of public concern is entitled to zealous

protection from the federal courts. In this regard it should be remembered, however, that the deprivation suffered by Pinar (letter of reprimand and two-day suspension without pay) is less serious than the demotion suffered by Bush.

Second, Pinar was not without adequate statutory procedures to challenge the appellees' unconstitutional conduct. As noted previously, Pinar was able to refute, with the assistance of counsel, the agency's claims against him regarding his two-day suspension, and present any evidence to support his answer that the appellees' conduct was illegal. Pinar's ability to grieve his two-day suspension gave him additional opportunity to rebut the agency's evidence and assert the unconstitutionality of the agency's conduct.

Pinar was also able to bring before the OSC his claims that the personnel actions taken against him were taken in retaliation for the exercise of his first amendment rights. Pinar's attempt to discount the effectiveness of this remedy on the basis that the Special Counsel has absolute discretion to decline to hear a case and to decline to take any action on a case that it does hear, see *Borrell v. Int'l Communications Agency*, 682 F.2d 981, 984-85 (D.C.Cir. 1982), is unpersuasive. The legislative history of the CSRA reveals that the Special Counsel can decline to investigate a charge only if it "appears groundless and frivolous on its face." S.Rep. No. 95-969, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News at 2754. Moreover, as outlined above, additional comprehensive remedies are available to employees whose claims are deemed to be not frivolous by the OSC.

Third, the government's interest in maintaining discipline in the workforce is great. As noted by Justice Powell,

> [I]n the present case, the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are es-

> sential if the Government is to perform its responsibilities effectively and economically. To this end, the Govenment, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.

Arnett v. Kennedy, 416 U.S. 134, 168 (1974).

After weighing the above considerations, it is clear that Pinar was afforded constitutionally adequate procedures to protect his first amendment rights. Indeed, Congress balanced those factors in enacting the CSRA and provided for separate procedures depending upon the gravity of the personnel action in question. To afford Pinar a full hearing with the right to direct judicial review of the relatively minor personnel actions he received would unduly frustrate the government's interest in efficiently administering the federal workforce. In addition, an employee such as Pinar, who is the subject of a minor personnel action should not be permitted immediate judicial relief in the form of punitive damages when such relief has been denied employees like Bush who are the subject of more serious personnel actions. To provide such relief would put supervisors in the untenable position of having to take proper supervisory actions against federal employees or take no action at all so as to avoid monetary liability. In light of the nature and effect of the personnel actions involved in this case, the procedures afforded to Pinar under the CSRA to protect his first amendment interests are Constitutionally adequate.

The Fifth, Sixth and Eleventh Circuits have dismissed constitutional damages claims brought by plaintiffs who had no greater statutory remedies available to them than Pinar had available to him in the instant case. In *Broadway v. Block*, 694 F.2d 979 (5th Cir. 1982) the plaintiff, who had been reassigned to a different position within the Farmer's Home Administration without a change in grade or pay, brought a *Bivens* cause of action in district court. In affirming the district court's dismissal of the

case the court relied on its earlier decision of *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981), *aff'd.*, 103 S.Ct. 2404 (1983) and its holding in *Broussard v. United States Postal Service*, 674 F.2d 1103 (5th Cir. 1982) that a plaintiff terminated from his job as postmaster had no *Bivens* remedy against federal officials. The court in *Broadway* noted

> The reasoning of *Bush* and *Broussard* applies with greater force to the facts of this case than it does to the facts of these earlier cases. Here the deprivation is less serious—a reassignment compared to a demotion in *Bush* and a termination in *Broussard*—while the violence done to the administrative scheme by allowing plaintiffs to sue directly in federal court is greater, since reassignments are no doubt more routine than demotions and terminations, and since demotions and terminations are already subject to some judicial review under the CSRA.

Id. at 895. *Accord, Watson v. U. S. Dept. of Housing and Urban Development*, 576 F. Supp. 580, 586 (N.D. Ill. 1983) ("the administrative remedies available to [an employee transferred allegedly in violation of his first amendment rights] are sufficiently adequate to require [the employee] to present his first amendment claim within that administrative process").

Similarly, in *Braun v. United States*, 707 F.2d 922 (6th Cir. 1983) a former Internal Revenue Service (IRS) employee brought a *Bivens* claim alleging he was given poor performance evaluations in retaliation for his speaking out against IRS deficiencies. The court affirmed the trial court's dismissal of the plaintiff's suit upon finding that "the unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy in the absence of affirmative congressional action." *Id.* at 926.

Recently, the Eleventh Circuit found *Bush* dispositive in affirming the dismissal of a federal employee's complaint which alleged she had been disciplined in violation of her fifth and first amendment rights. *Hallock v. Moses*, 731 F.2d 754 (11th Cir. 1984). The discipline received by the plaintiff was being reinstated to the position from which she was removed but without the same duties and responsibilities which she had prior to removal. The Court, after noting that "[t]he facts in *Bush* bear a notable resemblance to those in this case," concluded,

> We, like the Court in *Bush*, do not decide whether it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his first amendment rights . . . Congress is in a better position to decide whether the public interest would be served by fashioning the judicial remedy urged by [plaintiff]. Thus, we decline "to create a new substantive legal liability without legislative aid."

Id. at 757 (citations omitted).

Thus, since Pinar was provided a constitutionally adequate remedy to protect his first amendment rights, the Constitution does not require us to "create a judicially-fashioned damages remedy" in this case. See *Bush*, 103 S.Ct. at 2411, n. 14.

III

Pinar's complaint also requests that the defendants be enjoined from harassing him in the exercise of his first amendment rights and proposing any further unwarranted disciplinary action against him. The district court determined that in light of the comprehensive remedies available to Pinar under the CSRA, such relief in district court from the minor personnel actions at issue must be denied.

The parties agree that federal courts have the authority to grant injunctive relief to the victim of a constitu-

tional violation by virtue of their jurisdiction to decide all cases arising under the Constitution. As noted in *Bush*, "[28 U.S.C. § 1331 (1976)] provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution . . . but also the authority to choose among available judicial remedies in order to vindicate constitutional rights." *Bush*, 103 S.Ct. at 2409 (citation omitted). The issue presented is thus whether the district court's power to grant injunctive relief should be exercised in light of the comprehensive and constitutionally adequate remedial scheme Congress has established in the CSRA.

Pinar argues that because the CSRA does not provide for judicial review of the disciplinary actions taken against him, the district court is obligated to exercise its jurisdiction under 28 U.S.C. § 1331(a) and provide judicial relief. Pinar points out that where jurisdiction has been granted by Congress, access to the courts should be restricted "only upon a showing of clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) quoting *Rusk v. Cort*, 369 U.S. 367, 379-380 (1962). See also *Carlson v. Green*, 446 U.S. 14, 20 (1980). Such Congressional intent need not be expressly provided in the language of the statute, however. See *Bush*, 103 S.Ct. at 2411 ("when Congress provides an alternative remedy, it may, of course, indicate its intent by statutory language, by clear legislative history, *or perhaps even by the statutory remedy itself*, that the Court's power should not be exercised.") (emphasis added).

A review of the remedial provisions of the CSRA supports the finding that Congress clearly intended the comprehensive remedies available to Pinar to be exclusive. Certainly Congress did not intend to preclude the judiciary from reviewing all federal personnel matters. Rather, Congress specifically set forth which personnel

matters are entitled to judicial review. In general the CSRA provides:

> (1) for major personnel actions specified in the statute ("adverse actions"), direct judicial review after extensive prior administrative proceedings; (2) for specified minor personnel actions infected by particularly heinous motivations or disregard of law ("prohibited personnel practices"), review by the Office of Special Counsel, with judicial scrutiny "limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry," *Cutts v. Fowler, supra,* 692 F.2d at 140; and (3) for the specified minor personnel actions not so infected, and for all other minor personnel actions, review by neither OSC nor the courts.

Carducci v. Regan, 714 F.2d 171, 175 (D.C. Cir. 1983). The absence of a provision for direct judicial review of prohibited personnel actions among the carefully structured remedial provisions of the CSRA is evidence of Congress' intent that no judicial review in district court be available for the actions involved in this case. *See, e.g., U.S. v. Erika,* 456 U.S. 201, 208 (1982) ("in the context of the [Medicare] statute's precisely drawn provisions, this omission [of a provision for judical review of certain claims regarding medicare payments] provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims"); *Block v. Community Nutrition Institute,* 52 U.S.L.W. at 4698-4699 (1984) (the inclusion in the Agricultural Marketing Agreement Act of 1937 of a review procedure for milk handlers affected by milk market orders coupled with the omission of a similar procedure for consumers is evidence that Congress intended to preclude consumers from obtaining judicial review of market orders).

Pinar concedes that with respect to adverse actions which are appealable to the MSPB Congress has expressed its intent to avoid district court review by providing for

review in the Courts of Appeals (and now exclusively in the Federal Circuit). However, Pinar asserts Congress has not expressed its intent regarding actions which, like those complained of here, are not appealable to the Board. Thus, the argument goes, direct review in district court should be extended to employees like Pinar who are subjected to modest disciplinary actions which are not appealable to the Board. The incongruity presented by Pinar's argument is readily apparent. To grant an employee subjected to a letter of reprimand and two-day suspension in violation of his constitutional rights a full trial in district court while an employee, who is fired in violation of his constitutional rights, is allowed only limited judicial review in the Federal Circuit after exhausting his administrative remedies would fly in the face of Congress' clear intent to distinguish between disciplinary actions according to the severity of the punishment imposed and provide for varying degrees of review based on the gravity of the deprivation in question. Furthermore, since even the most minor of disciplinary actions can be alleged to have been taken in retaliation for something an employee once said that is protected by the first amendment, providing judicial review in federal district court for very minor disciplinary actions would require courts to become involved in the most rudimentary of personnel matters, and inhibit supervisors from taking even the most minor disciplinary actions for fear of having to justify their actions in federal court.

We are not unmindful of the decision of the District of Columbia Court of Appeals, *Borrell v. Int'l Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982) in which the court found no "clear statement" in the CSRA of Congressional intent to displace judicially-created remedies for constitutional violations. In *Borrell*, the plaintiff was a former probationary employee who brought an action for injunctive relief based on the first amendment contesting her removal from the International Communications Agency. Since the plaintiff was a probationary

employee, she did not have the right of tenured employees under the CSRA to appeal to the MSPB and thereafter to the Federal Circuit Court of Appeals. The Court determined that the statutory remedies available to the plaintiff were insufficient to redress her removal in violation of her constitutional rights. However, in the instant case Pinar was not removed from his employment; he was issued a letter of reprimand and suspended for two days, deprivations for which the statutory remedies available are clearly adequate to provide relief. While we do not address whether the holding of *Borrell* is correct with respect to probationary employees who are removed from their employment in violation of the Constitution, we decline to extend that holding to the personnel actions at issue here which are substantially less severe in nature. *But see, Cutts v. Fowler*, 692 F.2d 138 (D.C. Cir. 1982).[9]

We also note that in *Hallock v. Moses*, 731 F.2d 754 (11th Cir. 1984), the court affirmed the trial court's

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[9] In *Cutts* the D.C. circuit applied its holding in *Borrell* in finding the district court had jurisdiction over the appellant's claim that her transfer placed an unconstitutional burden on her freedom to marry, which is protected by the Fifth Amendment. However, while recognizing that the issue of whether a new statutory remedy displaces judicially created remedies for constitutional deprivations "turns on whether Congress meant for the new remedy to displace preexisting, judicially-created remedies, and whether the new remedies are adequate to protect the constitutional right at stake," *Cutts*, 692 F.2d at 140 (emphasis added), the court reached its conclusion without determining whether the statutory remedies afforded adequate protection for the minor personnel action involved.

Nor are we persuaded by the Seventh Circuit's reliance on *Borrell* to reject the Fifth Circuit's decision in *Bush* "to the extent that *Bush* posits that the rights of federal employees *qua* employees are coterminus with the administrative protections afforded by Congress." *Egger v. Phillips*, 710 F.2d 292, 298 (7th Cir. 1983) (en banc). *Egger*, decided before the Supreme Court affirmed the Fifth Circuit in *Bush*, found the Fifth Circuit's opinion "of questionable viability, at best." *Id.* at 298, n.5. Moreover, only four of the eight judges voting in *Egger* concurred in the portion of the opinion on which Pinar relies here. *Id.*, 710 F.2d at 325.

dismissal of a federal employee's claims for damages and injunctive relief grounded on the first and fifth amendments. In *Hallock* the appellant, who was reinstated to her former position but without the duties and responsibilities she had prior to her removal, alleged, *inter alia*, that the appellees had harassed and retaliated against her in violation of her right of free speech because she filed a valid employee grievance and spoke out in opposition to unlawful acts suffered by her. The appellant requested, like Pinar, that the court enjoin the appellees' harassment and retaliation against her. The appellees asserted that the appellant was not harassed or subjected to retaliation. Rather than remand the case to the district court to provide injunctive relief, the court described the case as a "classic federal employment dispute of the type anticipated by Congress when it enacted the procedures in 5 U.S.C.A. § 2302 (West Supp. 1984)." *Id.* at 757. The court directed the plaintiff, who had failed to exhaust the CSRA remedies available to her, to "request a job audit under the appropriate civil service provision(s) and follow the remedial system constructed by Congress to give federal employees, in [appellant's] position, appropriate relief." *Id.* at 758. Similarly, the minor personnel actions at issue in the instant case "are of the type anticipated by Congress" in enacting the remedial provisions of the CSRA, and should be resolved under that scheme.[10]

Thus, in this case where the personnel actions are so minor in nature and where the available statutory remedies are constitutionally adequate to provide relief, we conclude that Congress intended that judicially-created remedies in district court not be made available.

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[10] That Pinar has exhausted his administrative remedies in this case does not render *Hallock* less persuasive or require that Pinar be afforded additional relief in district court. Certainly, had the court in *Hallock* felt the available administrative remedies were inadequate to redress the appellant's first amendment claims, or that exhausting such remedies would prove to be an exercise in futility, the court could have ordered the district court to provide relief.

IV

Pinar also argues that the district court has subject matter jurisdiction over his claims of arbitrary and capricious agency action under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* While one "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, may generally obtain judicial review under the APA, the Act confers no cause of action where the "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2) or where the relevant statute "preclude(s) judicial review." 5 U.S.C. § 701(a)(1). As stated recently by the Supreme Court,

> Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved. Therefore, we must examine this statutory scheme "to determine whether Congress precluded all judicial review, and if not, whether Congress nevertheless foreclosed review to the class to which [Pinar] belong[s]."

Block v. Community Nutrition Institute, 52 U.S.L.W. 4697, 4698 (June 4, 1984) (citations omitted). As illustrated above, the statutory scheme of the CSRA reveals that Congress intentionally foreclosed judicial review to employees who, like Pinar, are subjected to disciplinary actions which are modest in nature by providing judicial review only of "adverse" personnel actions.

In *Broadway v. Block*, the Fifth Circuit refused to permit judicial review under the APA of the plaintiff's claim that she was improperly reassigned to a new position in violation of her constitutional rights. The court concluded, "[w]e decline to allow an employee to circumvent this detailed scheme governing federal employer-employee re-

lations by suing under the more general APA." *Broadway*, 694 F.2d at 986. The fact that Pinar exhausted his administrative remedies in this case does not diminish the significance of the *Broadway* court's rationale:

> allowing suit under the APA would likewise "encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of the opportunity to work out its personnel problems within the framework it has so painstakingly established."

Id. at 986. (quoting *Bush*, 647 F.2d at 577).

More recently, in *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983), the court held that after enactment of the CSRA, complaints setting forth non-constitutional allegations involving personnel actions fail to state a claim under the APA. In *Carducci*, the plaintiff alleged his reassignment was arbitrary and capricious and that through procedural irregularities his rights under the Due Process clause were violated. The appellate court refused to consider the due process issue, which was not properly addressed by counsel. However, with respect to the claim of arbitrary and capricious agency action the court concluded that the failure to provide judicial review for minor personnel actions "within the remedial scheme of so comprehensive a piece of legislation reflects a congressional intent that no judicial relief be available—that the matter be deemed 'committed to agency discretion by law.'" *Id.* at 174.

Nor does our recent decision in *Hostetter v. United States*, No. 83-1476 (4th Cir. August 2, 1984), support Pinar's position that he is entitled to judicial review of the personnel actions at issue here. *Hostetter* merely provides, "[i]n situations such as that here, in which there is no preclusion-of-review statute and no special statutory review procedure provided, the APA states the policy that

a person suffering legal wrong because of agency action should have judicial review thereof by way of any applicable form of legal action, including an action for injunctive relief." However, unlike Pinar, Hostetter was a nonappropriated fund instrumentality employee and thus was not subject to the provisions of the CSRA. Thus, whether or not the CSRA precludes review of the minor personnel actions at issue here was not considered by this court in *Hostetter*.

Thus, we agree with the district court that Congress clearly intended the CSRA to be the exclusive remedy for federal employees and the Court of Appeals for the Federal Circuit to be the sole forum for judicial review.

V

Finally, Pinar appeals the trial court's dismissal of his fifth amendment claim on the ground that Pinar had no property interest in his temporary promotion that required due process protection. Since the fifth amendment prohibits the deprivation of property without due process of law, Pinar must first establish that he was deprived of a cognizable property interest.[11] See *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972). It is well-settled that "property interests in employment positions are not created by the Constitution, but rather, are created and their dimensions defined by independent sources such as state law, local ordinances, and employment contracts." *Kersey v. Shipley*, 673 F.2d 730, 732 (4th Cir. 1982). See also, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sinderman*, 408 U.S. 593, 601 (1972).

Pinar argues his property interest in his temporary promotion for a period not to exceed one year was secured pursuant to 5 U.S.C. § 7513(a) and the terms and conditions of the employment agreement which he signed at the time he was initially promoted. 5 U.S.C. § 7513(a)

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[11] Pinar does not claim he was deprived of a liberty interest.

provides that an agency may take an adverse action such as a reduction in grade or pay "against an employee only for such cause as will promote the efficiency of the service." Pinar contends that, since under § 7513(a) he could only be demoted for cause, he had a property interest in his temporary promotion protected by due process. *Johnson v. United States*, 628 F.2d 187, 194 (D.C.Cir. 1980) (and cases cited). Certainly, a tenured employee terminated from a promotion which is not temporary is entitled to the application of the adverse action procedures outlined in § 7513(b). However, the protections set forth in § 7513(b) apply only to "employees" as defined by § 7511(a), which excludes a person such as Pinar who is serving a probationary or temporary appointment limited to one year. 5 U.S.C. § 7511(a)(1)(A) defines "employee" as:

> an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less . . .

Pinar's contention that he is not excluded by this definition of employee because § 7511(a)(1)(A) applies to exclude only one serving a temporary appointment, and not to Pinar, who received a temporary promotion, is without merit. Although, as Pinar points out, temporary appointments and temporary promotions are governed by separate chapters of the Federal Personnel Manual, the chapter of the Federal Personnel Manual governing temporary promotions recognizes that "adverse action procedures apply to the return of an employee to his or her regular position after a temporary promotion lasting *more than 2 years*. ([5 C.F.R.] § 752.401(c)(7))." Federal Personnel Manual Chap. 335, subch. 1-5(a)(1)(c). (emphasis added). The cited regulation expressly excludes the termination of a temporary promotion for two years or less from the adverse action procedures provided under the statute:

> (c) *Exclusions.* The subpart does not apply to actions and employees excluded by 5 U.S.C. 7511(b) and 7512, or the following. . .
>
> (7) Action which terminates a temporary promotion within a maximum period of two years and returns the employee to the position from which temporarily promoted, or reassigns or demotes the employee to a different position not at a lower grade or level than the position from which temporarily promoted.

5 C.F.R. § 752.401(c)(7). Thus, the termination of Pinar's temporary promotion for a period not to exceed one year, which returned him to the position from which he was promoted, was not an action against an employee for which cause was required under the statute. Where an employee can be removed from a position for less than cause, he has no constitutionally protected property interest in continued employment and can be removed summarily. *See Bishop v. Wood*, 426 U.S. 341, 345, n. 8 (1976).

In addition, the stated understanding between Pinar and the Agency, which is set forth in a letter confirming Pinar's temporary promotion, indicates Pinar had no cognizable property interest in his promotion. The letter provides:

> This is to confirm your selection under merit promotion announcement AMA-80-736 for temporary promotion [to] the position of Airport Police Officer, GS-083-6, effective February 22, 1981 not to exceed February 21, 1982. This temporary promotion may be terminated at any time at the discretion of the agency. The promotion may be made permanent if you meet the requirements specified in the position description prior to the expiration date of your temporary promotion.
>
> If you are returned to your regular position, the adverse action procedures outlined in FPM Chapter 752

> and the reduction-in-force procedures in FPM Chapter 351 will not apply. If you are returned to your regular position your salary at the GS-5 level will be the same as that to which you would have been entitled had you not been promoted, and any within-grade increase to which you would have been entitled if your performance was satisfactory.

This letter also contains Pinar's signature acknowledging that

> I have read the above information and understand the reasons for and conditions of the temporary promotion.

The clear import of this letter is that Pinar's promotion might be made permanent if he met the requirements stated in the job description, but that it could be terminated for less than cause at any time at the discretion of the agency.

Pinar's reliance on *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984) for the proposition that this agreement confers only limited discretion to the government is misplaced. In *Tymshare* the court held that a "compensation plan" giving company officers the right to change a sales representative's commission quota "within their sole discretion" could not be read to confer absolute discretion to reduce the quota for any reason whatsoever where another plausible interpretation of the language is available. The court concluded that "the 'sole discretion' intended was discretion to determine the existence or nonexistence of the various factors that would reasonably justify alteration of the sales quota." *Id.* at 1154. In reaching this conclusion, however, the court realized that while the phrase "within its sole discretion" is "not necessarily the equivalent of 'for any reason whatsoever, no matter how arbitrary or unreasonable,' [a]s applied to some contractual powers, it may indeed connote the sort of unfettered authority appellant would wish." *Id.* at 1154. As the

court recognized, what controls in interpreting such contractual language is, of course, the intent of the parties. In the instant case Pinar, unlike Tymshare, was a government employee. Unlike Tymshare Pinar was temporarily promoted to fill a temporary need within the agency. The tentative nature of the promotion at issue in this case makes it reasonable to read the agreement between Pinar and the government as intending to reserve to the government the right to terminate the temporary promotion for less than cause, rather than intending to confer some specie of property interest to Pinar. Having failed to show a "legitimate claim of entitlement" to the retention of his temporary promotion, *Board of Regents v. Roth*, 408 U.S. at 577 (1972), Pinar was not entitled to due process prior to the termination of his temporary promotion.

Accordingly, the decision of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 83-386-A

ENIS M. I. PINAR,
Plaintiff,

v.

ELIZABETH DOLE, *et al.*,
Defendants.

[Filed Aug. 12, 1983]

ORDER

This matter came before the Court on defendants' motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, or in the alternative for summary judgment under Rule 56. For the reasons stated from the bench the motion to dismiss is GRANTED. The case is therefore dismissed with prejudice.

Let the Clerk send a copy of this order to all counsel of record.

DATED: Aug. 12, 1983

/s/ Richard L. Williams
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 83-386-A

ENIS M. I. PINAR,
Plaintiff,

—vs.—

DREW LEWIS, *et al.*,
Defendants.

Alexandria, Virginia
Friday, August 12, 1983

The hearing on motion in the above-captioned matter commenced before the Honorable Richard L. Williams, United States District Judge, in the third-floor courtroom at 10:18, a.m.

Appearances:

On Behalf of Plaintiff:
JUNE KALIJARVI, Attorney at Law
GEORGE M. CHUZI, Attorney at Law

On Behalf of Defendants:
JOHN TYLER, Attorney at Law
Department of Justice

CATHERINE MARY REBARICK
Court Reporter
U.S. Courthouse
Alexandria, Virginia

* * * *

[22] THE COURT: The defendants' rule 12(b)(6) in alternative motion for summary judgment, is sustained. There is no fifth amendment claim on his temporary promotion, if that's what you call it. It's not a property interest.

It is protected under the fifth amendment, and I believe the plaintiff concedes that he has no liberty interest at issue on that particular claim.

On the other two claims he asserts the Bivins-type action and seeks judicial review under the APA of the personnel action taken against him.

In reading all the cases, and the APA, and the MSPB and the CSRA, it's obvious that in the overall scheme of things certain modest disciplinary actions taken against employees are considered de minimis, and whatever administrative remedies that are offered for those modest actions taken against them had finality.

On those things that are worth considering an elaborate scheme was set up that gave exclusive jurisdiction to a certain court for the federal circuit.

[23] I'm dismissing the whole case. Hopefully, it's in a posture that you can appeal it.

But I see nothing in the various acts that I refer to and cases that don't convince me one hundred percent that we can't redress every little slight and hurt feelings that the world provides. But to be functional you have to cut some things off early.

Congress concluded that they are going to cut off disciplinary actions that are modest in nature at the administrative level and not give any judicial review. And I applaud it.

We would all be so tied up in procedures that nothing would ever get done.

Some people might say nothing is getting done now because we have so many hoops and red tape to go through.

An order dismissing Mr. Pinar's claim *in toto* will be entered and counsel will receive a copy of it.

(WHEREUPON, at 10:46, A. M., the foregoing proceedings were concluded.)

STATUTORY PROVISIONS

The Civil Service Reform Act of 1978, as amended, Title 5, United States Code

§ 1206. Authority and responsibilities of the Special Counsel

(a) (1) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(2) If the Special Counsel terminates any investigation under paragraph (1) of this subsection, the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of the termination of the investigation and the reasons therefor.

(3) In addition to authority granted under paragraph (1) of this subsection, the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(b) (1) In any case involving—

(A) any disclosure of information by an employee or applicant for employment which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation; or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

if the disclosure is not specifically prohibited by law and if the information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure by an employee or applicant for employment to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation; or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

the identity of the employee or applicant may not be disclosed without the consent of the employee or applicant during any investigation under subsection (a) of this section or under paragraph (3) of this subsection, unless the Special Counsel determines that the disclosure of the identity of the employer or applicant is necessary in order to carry out the functions of the Special Counsel.

(2) Whenever the Special Counsel receives information of the type described in paragraph (1) of this subsection, the Special Counsel shall promptly transmit such information to the appropriate agency head.

(3) (A) In the case of information received by the Special Counsel under paragraph (1) of this section, if, after such review as the Special Counsel determines practicable (but not later than 15 days after the receipt of the information), the Special Counsel determines that there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or mis-

management, gross waste of funds, abuse of authority, or substantial and specific danger to the public health or safety, the Special Counsel may, to the extent provided in subparagraph (B) of this paragraph, require the head of the agency to—

(i) conduct an investigation of the information and any related matters transmitted by the Special Counsel to the head of the agency; and

(ii) submit a written report setting forth the findings of the head of the agency within 60 days after the date on which the information is transmitted to the head of the agency or within any longer period of time agreed to in writing by the Special Counsel.

(B) The Special Counsel may require an agency head to conduct an investigation and submit a written report under subparagraph (A) of this paragraph only if the information was transmitted to the Special Counsel by—

(i) any employee or former employee or applicant for employment in the agency which the information concerns; or

(ii) any employee who obtained the information in connection with the performance of the employee's duties and responsibilities.

* * * *

(6) Upon receipt of any report of the head of any agency required under paragraph (3) (A) (ii) of this subsection, the Special Counsel shall review the report and determine whether—

(A) the findings of the head of the agency appear reasonable; and

(B) the agency's report under paragraph (3) (A) (ii) of this subsection contains the information required under paragraph (4) of this subsection.

(7) Whenever the Special Counsel transmits any information to the head of the agency under paragraph (2)

of this subsection but does not require an investigation under paragraph (3) of this subsection, the head of the agency shall, within a reasonable time after the information was transmitted, inform the Special Counsel, in writing, of what action has been or is to be taken and when such action will be completed. The Special Counsel shall inform the complainant of the report of the agency head.

* * * *

(c) (1) (A) If, in connection with any investigation under this section, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved, and to the Office, and may report the determination, findings, and recommendations to the President. The Special Counsel may include in the report recommendations as to what corrective action should be taken.

(B) If, after a reasonable period, the agency has not taken the corrective action recommended, the Special Counsel may request the Board to consider the matter. The Board may order such corrective action as the Board considers appropriate, after opportunity for comment by the agency concerned and the Office of Personnel Management.

(2) (A) If, in connection with any investigation under this section, the Special Counsel determines that there is reasonable cause to believe that a criminal violation by an employee has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

(B) In any case in which the Special Counsel determines that there are reasonable grounds to believe that

a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel may proceed with any investigation or proceeding instituted under this section notwithstanding that the alleged violation has been reported to the Attorney General.

(3) If, in connection with any investigation under this section, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred which is not referred to in paragraph (1) or (2) of this subsection, the violation shall be reported to the head of the agency involved. The Special Counsel shall require, within 30 days of the receipt of the report by the agency, a certification by the head of the agency, which states—

(A) that the head of the agency has personally reviewed the report; and

(B) what action has been, or is to be, taken, and when the action will be completed.

(d) The Special Counsel shall maintain and make available to the public a list of noncriminal matters referred to heads of agencies under subsections (b) (3) (A) and (c) (3) of this section, together with—

(1) reports by the heads of agencies under subsection (b) (3) (A) of this section, in the case of matters referred under subsection (b); and

(2) certifications by heads of agencies under subsection (c) (3), in the case of matters referred under subsection (c).

The Special Counsel shall take steps to ensure that any such public list does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.

(e) (1) In addition to the authority otherwise provided in this section, the Special Counsel shall, except as pro-

vided in paragraph (2) of this subsection, conduct an investigation of any allegation concerning—

(A) political activity prohibited under subchapter III of chapter 73 of this title, relating to political activities by Federal employees;

(B) political activity prohibited under chapter 15 of this title, relating to political activities by certain State and local officers and employees;

(C) arbitrary or capricious withholding of information prohibited under section 552 of this title, except that the Special Counsel shall make no investigation under this subsection of any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order.

(D) activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and

(E) involvement by any employee in any prohibited discrimination found by any court or appropriate authority to have occurred in the course of any personnel action.

(2) The Special Counsel shall make no investigation of any prohibited activity referred to in paragraph (1) (D) or (1) (E) of this subsection if the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure.

(f) During any investigation initiated under this section, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

(g) (1) Except as provided in paragraph (2) of this subsection, if the Special Counsel determines that disciplinary action should be taken against any employee—

(A) after any investigation under this section, or

(B) on the basis of any knowing and willful refusal or failure by an employee to comply with an order of the Merit Systems Protection Board,

the Special Counsel shall prepare a written complaint against the employee containing his determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Merit Systems Protection Board in accordance with section 1207 of this title.

(2) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in paragraph (1) of this section, together with any response by the employee, shall be presented to the President for appropriate action in lieu of being presented under section 1207 of this title.

(h) If the Special Counsel believes there is a pattern of prohibited personnel practices and such practices involve matters which are not otherwise appealable to the Board under section 7701 of this title, the Special Counsel may seek corrective action by filing a written complaint with the Board against the agency or employee involved and the Board shall order such corrective action as the Board determines necessary.

(i) The Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board and the Special Counsel shall not have any right of judicial review in connection with such intervention.

(j) (1) The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.

(2) Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33 of this title).

(k) The Special Counsel may prescribe regulations relating to the receipt and investigation of matters under the jurisdiction of the Special Counsel. Such regulations shall be published in the Federal Register.

(l) The Special Counsel shall not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73 of this title).

(m) The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, and actions initiated by it before the Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this section, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this subsection shall include whatever recommendations for legislation or other action by Congress the Special Counsel may deem appropriate.

§ 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level;

with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include—

(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary

and warranted by conditions of good administration.

(C) "agency" means an Executive agency, the Administrative Office of the United States Courts, and the Government Printing Office, but does not include—

(i) a Government corporation;

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for—

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under—

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

§ 7503. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).

(b) An employee against whom a suspension for 14 days or less is proposed is entitled to—

(1) an advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order effecting the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

§ 7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b) (2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when

made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such

section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b) (2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

APPLICABLE REGULATIONS OF THE OFFICE OF PERSONNEL MANAGEMENT TITLE 5 C.F.R. (1984)

PART 771—AGENCY ADMINISTRATIVE GRIEVANCE SYSTEM

Subpart A—[Reserved]

Subpart B—General

§ 771.201 Purpose.

This part sets forth the regulations under which each agency shall establish an agency administrative grievance system.

§ 771.202 Definitions.

In this part:

"*Bargaining unit employee*" means an employee included in an appropriate exclusive bargaining unit as determined by the Federal Labor Relations Authority for which a labor organization has been granted exclusive recognition.

"*Employee*" includes a former employee of an agency for whom a remedy can be provided.

"*Grievance*", except as provided in § 771.206 of this part, means a request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction relating to the employment of the employee(s) which is subject to the control of agency management.

"*Grievance file*" means a separate file which contains all documents related to the grievance, including but not limited to any statements of witnesses, records or copies thereof, the report of the hearing when one is held, state-

ments made by the parties to the grievance, and the decision.

"Personal relief" means a specific remedy directly benefiting the grievant(s) and may not include a request for disciplinary or other action affecting another employee.

§ 771.203 Agency coverage.

Except as provided in § 771.206(a), this part applies to the executive agencies and military departments as defined by sections 102 and 105 of title 5, United States Code, and to those organizational units of the legislative and judicial branches having positions in the competitive service.

§ 771.204 Employee coverage.

(a) *Required coverage.* Except as provided in § 771.206(b), this part shall cover all nonbargaining unit employees of the agency.

(b) *Discretionary coverage.* An agency may extend the coverage of this part to bargaining unit employees consistent with the provisions of 5 U.S.C. 7121, or to applicants for employment with the agency.

§ 771.205 Grievance coverage.

Except as provided in § 771.206(c), this part applies to any matter of concern or dissatisfaction relating to the employment of an employee which is subject to the control of agency management, including any matter on which an employee alleges that coercion, reprisal, or retaliation has been practiced against him or her.

§ 771.206 Exclusions.

(a) *Agencies excluded.* This part does not apply to the Central Intelligence Agency, the Federal Bureau of Investigation, the Defense Intelligence Agency, the National Security Agency, the Nuclear Regulatory Commission, the

Tennessee Valley Authority, the Postal Rate Commission, and the U.S. Postal Service.

(b) *Employees excluded.* This part does not apply to:

(1) A noncitizen appointed under Civil Service Rule VIII, § 8.3 of this title;

(2) an alien appointed under section 1471(5) of title 22, United States Code;

(3) An individual paid from funds as defined in section 2105(c) of title 5 or section 4202(5) of title 38, United States Code;

(4) A physician, dentist, nurse, or other employee appointed under Chapter 73 of title 38, United States Code;

(5) A member of the Foreign Service of the United States covered under the Foreign Service Grievance System as defined in Part J of Title VI of the Foreign Service Act of 1946, as amended; or

(6) An employee otherwise included under § 771.204(a) of this subpart when he or she is a member of a class of employees excluded from coverage by the Office on the recommendation of the head of the agency concerned.

(c) *Matters excluded.* (1) This part does not apply to:

(i) The content of published agency regulations and policy;

(ii) A decision which is appealable to the Merit Systems Protection Board or subject to final administrative review by the Office of Personnel Management or the Equal Employment Opportunity Commission under law or regulations of the Office or the Commission.

(iii) Nonselection for promotion from a group of properly ranked and certified candidates;

(iv) A preliminary warning notice of an action which, if effected, would be covered under the grievance system

or excluded from coverage by paragraph (c)(1)(ii) of this section;

(v) A return of a Senior Executive Service career appointee to the General Schedule or another pay system during the one year period of probation or for less than fully successful executive performance under section 3592 of title 5, United States Code;

(vi) A reassignment of a Senior Executive Service appointee following the appointee's receipt of an unsatisfactory rating under section 4314 of title 5, United States Code.

(vii) An action which terminates a temporary promotion within a maximum period of two years and returns the employees to the position from which the employee was temporarily promoted, or reassigns or demotes the employee to a different position that is not at a lower grade or pay than the position from which the employee was temporarily promoted;

(viii) An action which terminates a term promotion at the completion of the project or specified period, or at the end of a rotational assignment in excess of two years but not more than five years, and returns the employee to the position from which promoted or to a different position of equivalent grade and pay in accordance with § 335.102(g).

(ix) The substance of the critical elements and performance standards of an employee's position which have been established in accordance with the requirements of subchapter I of chapter 43 of title 5, United States Code, and Part 430 of this title;

(x) The granting of or failure to grant an employee performance award or the adoption of or failure to adopt an employee suggestion or invention under sections 4503-4505, or the granting of or failure to grant an award of the rank of meritorious or distinguished executive under section 4507 of title 5, United States Code;

(xi) The receipt of or failure to receive a performance award under section 5384 of title 5, United States Code, or a quality salary increase under section 5336 of title 5, United States Code.

(xii) A merit pay determination or a merit pay increase or the lack of a merit pay increase under the Merit Pay System, or a decision on the granting of or failure to grant cash or honorary recognition under chapter 54 of title 5, United States Code, and Part 540 of this title;

(xiii) The termination under Subpart H of Part 315 of this title of a probationer for unsatisfactory performance;

(xiv) The termination under Subpart D of Park 359 of this title of an SES career appointee during the probation for unsatisfactory performance.

(xv) A performance evaluation under subchapter II of chapter 43 of title 5 United States Code.

(xvi) An action taken in accordance with the terms of a formal agreement voluntarily entered into by an employee which: (A) assigns the employee from one geographical location to another or (B) returns an employee from an overseas assignment.

(2) This part does not apply to the following actions unless the agency extends the coverage to any aspect of them:

(i) A return of an employee from an initial appointment as a supervisor or manager to a nonsupervisory or non-managerial position for failure to satisfactorily complete the probationary period under section 3321(a)(2) of title 5, United States Code, and Subpart 1 of Part 315 of this title; and

(ii) A separation action not excluded by paragraph (c)(1) of this section.

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Subpart C—Establishment of Agency Administrative Grievance System

§ 771.301 Establishment and publication.

(a) *Establishment.* Each agency covered by this part shall establish and administer an agency grievance system in accordance with the criteria in § 771.302 of this subpart.

(b) *Publication.* Each agency shall publish and make available to employees copies of its administrative grievance procedures.

§ 771.302 Criteria.

The following criteria shall govern the establishment and administration of an agency administrative grievance system:

(a) Prompt consideration of each grievance, including reasonable time limits for processing the grievance.

(b) Procedures appropriate for the matter being grieved which provide the employee a reasonable opportunity to present a grievance and receive fair consideration of the matter being grieved. The procedures shall provide for fact-finding, when appropriate, which shall include a hearing when one is suitable to ascertain the circumstances concerning the grievance. Fact-finding procedures shall be carried out by a person(s) who has not been involved in the matter being grieved and who does not occupy a position subordinate to any official who recommended, advised, made a decision on, or who otherwise is or was involved in, the matter being grieved.

(c) Assurance to the grievant of:

(1) Freedom from restraint, interference, coercion, discrimination or reprisal in presenting a grievance;

(2) The right to be accompanied, represented, and advised by a representative of his or her own choosing, ex-

cept that an agency may disallow the choice of an individual as a representative which would result in a conflict of interest or position, which would conflict with the priority needs of the agency, or which would give rise to unreasonable costs to the Government;

(3) A reasonable amount of official time to present the grievance if the employee is otherwise in a duty status; and

(4) The right to communicate with the servicing personnel office or a counsel of the agency.

(d) Assurance to the employee's representative of:

(1) Freedom from restraint, interference, coercion, discrimination or reprisal; and

(2) A reasonable amount of official time to present the grievance if the representative is an employee of the agency and is otherwise in a duty status;

(e) When fact-finding is utilized, establishment of a grievance file which is made available to the grievant and his or her representative for review and comment;

(f) At any time an employee places a grievance in writing, a written decision, which includes a report of findings and reasons for the determination, made by:

(1) An official at a higher level than any employee involved in any phase of the grievance, except when the head of the agency has been involved, or

(2) The official(s) designated to determine the disputed facts.

§ 771.303 Obligation of the grievant.

An employee in exercising the entitlement to present a grievance under this part shall:

(a) Comply with appropriate time limits established by the agency;

(b) Furnish sufficient detail to clearly identify the matter being grieved; and

(c) Specify the personal relief being requested.

§ 771.304 Review by the Office of Personnel Management.

The Office of Personnel Management shall review from time to time each agency administrative grievance system developed under this part to determine whether the administrative grievance system meets the requirements of this part. The Office shall require corrective action to bring a system which fails to meet the requirements into conformity. The Office does not act on a request by an employee to review the processing of, or the decision on, an individual grievance.